IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3743 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KALLU LAKHANSING KUSWAH

Versus

COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 3743 of 2004

MS BANNA S DUTTA for Petitioner No. 1

MR AY KOGJE, LD.AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 09/08/2004

ORAL JUDGEMENT

1. By filing this petition, the petitioner-detenu has challenged the detention order passed against him by the detaining authority, by its order dated 6.2.2004

under the provisions of the Gujarat Prevention of Anti-social Activities Act, 1985 ("PASA", for short). The petitioner is detained as a "bootlegger" under PASA. Along with the order, the petitioner has also been served with the grounds of detention.

2. In the grounds of detention, there is a reference about one criminal case, which is pending against the petitioner. The aforesaid case is registered against the petitioner under the Bombay Prohibition Act. It is alleged that, the petitioner is dealing in foreign liquor. The detaining authority, after recording subjective satisfaction and after recording the statements of the witnesses, whose names have not been disclosed to the petitioner, has detained him under PASA. The said detention order is challenged by the petitioner by way of this petition.

3. Learned advocate for the petitioner submitted that, the names of the witnesses are not disclosed by claiming privilege under Section 9(2) of the PASA. It is submitted that, before claiming the privilege under sec.9(2) of the PASA, the authority has not tried to verify about the credentials and character of the detenu. It is further submitted that the privilege is claimed in a routine manner and, therefore, without any basis, the authority has tried to withhold the names of witnesses and as a result of that, the petitioner is denied the valuable right of making effective representation.

4. To substantiate her say, learned advocate for the petitioner has relied upon the decision of this Court rendered in the case of KISHOR NAGINBHAI PARMAR v. STATE OF GUJARAT, reported in 2000 (4) GLR 3236, wherein it is held in para 11 as under :

> "11. In this view of the matter, the detaining authority while exercising powers under Section 9 (2) of the P.A.S.A.Act for claiming privilege is expected to consider the general background, character, antecedents, criminal tendency of propensity etc. of the detenu. In the instant case, if affidavit or the grounds of detention are considered, all that is recorded by the detaining authority is that the fear expressed by the witnesses is found to be genuine and correct by the detaining authority. The detaining authority has recorded that it has carefully scrutinized, examined and considered all the materials that were produced before him by the

> sponsoring authority. It is, therefore, clear that the detaining authority, while verifying the statements of the witnesses and while considering the question of exercising privilege under Sec. 9 (2) of the P.A.S.A. Act, has not taken any independent steps for considering general background, character, antecedents, criminal tendency etc. while recording subjective satisfaction, but has relied solely on the material produced by the sponsoring authority. There is no contemporaneous record to indicate the steps taken by the detaining authority and the grounds and reasons for arriving at the subjective satisfaction. It is therefore very difficult to conclude that the detaining authority has considered general background, character, antecedents, criminal tendency and propensity etc. of the detenu while arriving at the subjective satisfaction, for the need of exercise of powers under Sec. 9 (2) of the P.A.S.A. Act and claim privilege by not disclosing identity of the anonymous witnesses."

5. The learned advocate for the petitioner has further submitted that, in the instant case, there is nothing on record to show that the detaining authority has tried to verify the antecedents and credentials of the detenu, and if the statements are taken out then there is only one solitary case registered against the petitioner, and therefore, there is total non application of mind on the part of the detaining authority while claiming privilege under Section 9(2) of PASA, and therefore, on that ground also, the impugned order is required to be quashed and set aside.

6. Learned advocate for the petitioner submitted that, only one solitary case is registered against the petitioner under the Bombay Prohibition Act. It is submitted that, from the aforesaid case, it cannot be said that the activity of the petitioner is such which is injurious to public health or that he has violated any public order by committing offence under the Bombay Prohibition Act. To substantiate her say, the learned advocate for the petitioner has relied upon the decision of this Court in the case of Sandip Omprakash Gupta v. State of Gujarat reported in 2004(1) GLR 864 in which this Court has held that, on the basis of a solitary incident, resort to preventive detention cannot be made, as such solitary case can be considered as a violation of law and order on the part of detenu and not the public order.

7. Considering the aforesaid aspect of the matter, learned advocate for the petitioner has submitted that, it cannot be said that the petitioner has violated the public order or even, it cannot be said that the activities of the petitioner are injurious to public health. Over and above the aforesaid aspect, on the ground of not disclosing the names of witnesses by claiming privilege under sec.9(2) of the PASA, and also on the ground that only a solitary case is registered against the petitioner, and in view of the judgment of this Court in the case of Kishor Naginbhai Parmar (supra) as well as in the case of Sandip Omprakash Gupta (supra), the petition is required to be allowed.

8. In view of what is stated above, this petition is allowed. The order of detention dated 6.2.2004 is quashed and set aside. The detenu, Kallu Lakhansing Kuswah, is ordered to be set at liberty forthwith, if he is not required in connection with any other case. Rule is made absolute.

(P.B. Majmudar, J.)

syed/